The Dow Chemical Company *and* Local 12075, United Steelworkers of America, AFL–CIO–CLC. Case 7–CA–39233

August 24, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On October 1, 1997, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Charging Party Union filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions to the extent consistent with this decision and to adopt the recommended Order.

The Respondent manufactures Saran Wrap and other products at its facility in Midland, Michigan. The Respondent and the Union are parties to a collective-bargaining agreement covering the Respondent's employees at its Midland facility. Article X, section 3, of the agreement provides that before "outsourcing" bargaining unit work, the Respondent must bargain with the Union in an effort to, inter alia, find alternatives to outsourcing and thus keep the work in the unit.

As the judge found, before November 1996, the Respondent manufactured the complete Saran Wrap finished product for DowBrands. In November 1996, the Respondent announced to the Union that the final stages of the Saran Wrap manufacturing process—the tasks of slitting the bulk film, winding it into rolls, and packaging it—would no longer be done by unit employees, but instead would be done by an outside contractor at a different site. Some 30 unit jobs were expected to be lost as a result of this outsourcing decision. The Respondent, without the Union's consent, declined to follow the procedures set forth in article X, section 3, of the contract with respect to that decision. The complaint alleges that the Respondent's conduct violated Section 8(a)(5) and (1) of the Act.

The judge recommended dismissal of the complaint. First, he found that the decision to remove the slitting, winding, and packaging of Saran Wrap from the Respondent's plant and have it done by the outside contractor was made by DowBrands, Inc., a wholly owned subsidiary of the Respondent, not by the Respondent itself. The judge further found that DowBrands and the Respondent did not constitute a single employer, that DowBrands was not a party to the collective-bargaining agreement, and therefore that it had no duty to bargain with the Union or to comply with the provisions of article X, section 3. He also found that, in any event, this outsourcing decision was not covered by article X, section 3. The Union has excepted to the judge's findings. For the reasons that follow, we agree with the judge that DowBrands and the Respondent are not a single employer, that DowBrands, not the Respondent, made the outsourcing decision in question, and that the Respondent did not act unlawfully by failing to follow the provisions of article X, section 3, of the contract. We therefore find it unnecessary to decide whether the outsourcing decision was, as the judge found, not covered by article X, section 3.

In determining whether two nominally separate employing entities constitute a single employer, the Board looks to four factors—common ownership, common management, interrelation of operations, and common control of labor relations. No single factor is controlling, and not all need be present.[1] Rather, single-employer status depends on all the circumstances, and is characterized by the absence of the arm's-length relationship found between unintegrated entities.[2]

Applying this four-factor test to the facts before us,[3] we find that the General Counsel has failed to demonstrate that the Respondent and DowBrands constitute a single employer.[4] Of course, because DowBrands is wholly owned by the Respondent, the factor of common ownership is present.[5] Common ownership alone, however, does not establish a single-employer relationship.[6] Common ownership by itself indicates only *potential* control over the subsidiary by the parent entity; a single-employer relationship will be found only if one of the companies exercises *actual* or *active* control over the day-to-day operations or labor relations of the other.[7]

We therefore turn to the question of whether either the Respondent or DowBrands exercises actual or active control over the other. Concerning common management, the record reveals that each company has its own president. DowBrands has separate vice presidents who are accountable only to it, and who manage and run the company. As the Union points out, executives of the Respondent make up a majority of DowBrands' board of directors, and DowBrands' president reports to the presi-

[1] Member Hurtgen does not pass on whether single-employer status can be found in the absence of common control of labor relations.

[2] *Radio Technicians Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965) (per curiam); *Emsing's Supermarket*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989); *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979), enfd. mem. 626 F.2d 865 (9th Cir. 1980).

[3] Our description of the structure and operations of the Respondent and DowBrands is taken from the credited and/or unrebutted testimony of the Respondent's witnesses.

[4] Contrary to the Union, the burden is on the General Counsel to prove that the two companies are a single employer, not on the Respondent to prove the reverse. *Masland Industries*, 311 NLRB 184, 186 (1993).

[5] Id. at 186.

[6] Id.

[7] See, e.g., *Los Angeles Newspaper Guild, Local 69 (Hearst Corporation)*, 185 NLRB 303, 304 (1970), enfd. 443 F.2d 1173 (9th Cir. 1971).

dent of the Respondent. However, there is no indication that any officer of either company is also an officer of the other, or that any officer or director of DowBrands (even those who are executives of the Respondent) serves as a director of the Respondent. More importantly, there is nothing in the record that suggests that either the Respondent's president or its officers who serve on the DowBrands board of directors exercise active or actual control over that subsidiary's day-to-day operations. To the contrary, it appears that the actual management of DowBrands is carried out by its own officers, who are accountable to it alone.[8]

Under similar circumstances, the Board in *Western Union Corp.*[9] found common management absent. There, although a majority of Western Union's board of directors were also directors of the holding company that owned Western Union, none of Western Union's officers were either officers or directors of the parent company. The Board found that the fact that each company had its own officers precluded a finding of common management based on common directors.[10] We make the same finding here. Thus, although the Respondent's executives make up a majority of DowBrands' board of directors and DowBrands' president reports to the president of the Respondent, we find those considerations outweighed by the fact that each company has separate officers who make its operating decisions.

Our finding in this regard is underscored by the events at issue here. The judge found that the decision to give the slitting, winding, and packaging of Saran Wrap to an outside contractor was made entirely by DowBrands, not by the Respondent. The decision was spurred by the fact that the equipment used by the Respondent in slitting and winding, while it could process wide sheets of film at high speeds, also caused the film to wrinkle. The wrinkles often led to tears in the film, which in turn led to frequent complaints by consumers. Alternative technology existed, in which wide sheets of film are first slit into narrow rolls which then can be wound separately without wrinkling, but to convert the Respondent's operations to the use of that technology would have entailed a capital outlay of some $6 million, which neither the Respondent nor DowBrands was interested in making. DowBrands appointed a project team to study the problem and recommend a solution. The project team identified an outside contractor that was willing to make the investment in new equipment to convert to the new technology. The team proposed to the DowBrands operating board that the slitting, winding, and packaging of Saran Wrap be given to the outside contractor. As the judge found, it was the operating board, composed of the DowBrands' vice presidents, which made the decision to adopt the proposal.[11] The decision was announced to the Union as having been made by DowBrands. There is no evidence in the record to indicate that the Respondent played any part in the decision, except for supplying information to the DowBrands project team.

Centralized control of labor relations does not exist here, because the labor relations functions of the Respondent and DowBrands are completely separate. The Respondent's labor relations manager has no responsibility for DowBrands' labor relations or human resources. DowBrands' vice president for human resources reports to DowBrands' president, not to the Respondent, and is not involved in any way with labor relations at the Respondent's plant. There is no showing that either of those individuals holds any position in more than one company. DowBrands has its own employees, compensation, and benefits. The employees of DowBrands are not represented by a union, and DowBrands' operating board played no role in negotiating the Respondent's collective-bargaining agreement with the Union. Thus, this factor, which the Board has described as "critical" to a finding of single-employer status,[12] is wholly lacking in this case.

We also find that interrelationship of operations has not been demonstrated here. DowBrands and the Respondent are engaged in different kinds of business and have separate facilities and different customers. The Respondent is a manufacturer of chemical products that it sells to commercial customers, including DowBrands. DowBrands makes and sells products that are marketed to consumers. Thus, the two companies are related to each other as customer and supplier; indeed, DowBrands is the largest customer of the Respondent's Saran Wrap production facility. DowBrands also purchases services, including engineering services, from the Respondent if satisfactory terms can be obtained.[13] In other respects, however, the two companies' operations are entirely separate. As noted above, they operate out of separate facilities, produce different products, and have different customers. The companies have separate books, records, and financial information, and DowBrands does its own business and financial planning. Thus, although the Respondent and DowBrands operations are interrelated to an extent, as a result of their relationship as supplier and customer, in all other respects the element of interrelationship of operations is lacking. On similar facts, the

[8] In addition, DowBrands exercises no control over the management of the Respondent's facility at which Saran Wrap is made.

[9] 224 NLRB 274 (1976), affd. sub nom. *United Telegraph Workers v. NLRB*, 571 F.2d 665 (D.C. Cir. 1978), cert. denied 439 U.S. 827 (1978).

[10] 224 NLRB at 274–275, 276.

[11] The decision was not, in other words, made by the DowBrands' board of directors, as the Union contends.

[12] Id. at 276.

[13] DowBrands purchases engineering services from other firms as well.

Board has found insufficient evidence to establish interrelated operations,[14] and we so find here.

In sum, although common ownership exists here because DowBrands is a wholly-owned subsidiary of the Respondent, the other three factors, including the "critical" factor of centralized control of labor relations, are absent. Consequently, we are unable to find an absence of the arm's length relationship found among unintegrated companies that characterizes a single-employer relationship. We therefore agree with the judge that the Respondent and DowBrands are not a single employer. And because DowBrands and not the Respondent made the decision to have the slitting, winding, and packaging portions of the Saran Wrap production process done by an outside contractor, there was nothing for the Respondent and the Union to bargain about concerning that decision. It follows that the Respondent did not violate Section 8(a)(5) by failing to invoke the procedures under article X, section 3, of the collective-bargaining agreement with respect to that decision, or by otherwise refusing to bargain with respect to that decision.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dwight R. Kirksey, Esq., for the General Counsel.
David G. Wilkins, Esq. and *Robert W. Sikkel, Esq*., of Midland and Muskegon, Michigan, for the Respondent-Employer.
William L. Laney, of Midland, Michigan, for the Charging Party.

[14] See *Teamsters Local 776 (Pennsy Supply*), 313 NLRB 1148, 1166–1167 (1994). There, as here, the two companies had separate business purposes, offices, and labor relations, and the Board found that those factors outweighed the fact that one firm was virtually totally dependent on the other for business. Id. at 1165, 1167.

American Stores Packing Co., 277 NLRB 1656, 1657 (1986), and *Anadite Industrial Supply Co*., 238 NLRB 1291 (1978), cited by the Union, do not require a different result. In *American Stores*, the Board found interrelated operations where the subsidiary was a "captive supplier," which furnished all of its products to the parent company; the subsidiary did not bill the parent for its products, but instead arranged for the parent to transfer funds to the subsidiary's bank account when the subsidiary needed money to cover operating costs. 277 NLRB at 1657. Here, by contrast, the Respondent has customers other than DowBrands, and there is no evidence that the supplier-customer relationship between the two is anything other than arm's length. In *Anadite*, the Board found interrelated operations where some 90 percent of one company's business was with the other. However, other indicia of interrelated operations existed in that case as well, including the filing of a single tax return and the performance of many office functions on behalf of both companies by the same office staff. Here, except for DowBrands' purchase of an unspecified amount of services from the Respondent (apparently at arm's length), the only indicator of interrelated operations is that DowBrands is the largest purchaser of film from the Respondent's Saran Wrap plant. As in *Pennsy Supply*, we find this insufficient to overcome the absence of other indicators of interrelationship of operations.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried in Midland, Michigan, on July 9, 1997, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 7 of the National Labor Relations Board (the Board) on February 12, 1997. The underlying charge was filed on November 26, 1996,[1] by Local 12075, United Steelworkers of America, AFL–CIO–CLC (the Charging Party or Union), and alleges that The Dow Chemical Company (the Respondent or Employer) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

ISSUES

The complaint alleges that the Respondent failed to continue in effect all the terms and conditions of the parties' collective-bargaining agreement (CBA), by refusing to agree to utilize the article X, section 3 outsourcing provision with regard to its decision to eliminate the final wrap packaging process of Saran Wrap. By this conduct, the Respondent has been failing and refusing to bargain collectively and in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the global manufacture and production of basic chemicals and chemical specialty products, with an office and place of business in Midland, Michigan, where in conducting its business operations it derived gross revenues in excess of $1 million during the calendar year ending December 31, and annually shipped products valued in excess of $50,000 from its Midland facility to points located outside the State of Michigan. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent and the Union have a 50-year history of collective bargaining at the Midland facility. The parties are presently subject to a 3-year CBA that will expire by its terms on February 9, 1998.

The gravaman of the instant dispute concerns whether the Respondent refused to utilize the provisions of article X, section 3, when it announced on November 13 that DowBrands, a wholly owned subsidiary of Respondent, will utilize a new roll-winding technology to improve product quality for Saran Wrap brand plastic film. Since DowBrands determined to relocate the final winding and packaging process to a non-Dow site, approximately 30 bargaining unit jobs were lost. The Union takes the position that the provisions of article X, section 3 cover such a situation while the Respondent asserts that the

[1] All dates hereafter are in 1996 unless otherwise indicated.

elimination of the winding and packaging process is not applicable to the parties' CBA because those activities are production decisions and the Employer has the right to determine what products are made and where they are made.

Before November 1996, Respondent manufactured the complete Saran Wrap finished product for DowBrands, its primary customer. This consisted of making the Saran film and then using certain equipment to complete the back end of the production process, which is the final winding and packaging of the product. The finished consumer product known as Saran Wrap is then shipped to local grocery stores to be sold in the consumer household market.

In June and July of 1996, DowBrands conducted certain studies to evaluate various ways to improve its business including Saran Wrap. In this regard, the "Wraps" business had been losing money for many years and the volume of sales was declining. In the particular case of Saran Wrap, the product had significant quality problems of consumer dissatisfaction and it was felt that this was a significant part of why volume was decreasing. After considering a number of viable options, including consolidating the Saran Wrap back end production process with the DowBrands Handi Wrap operation in Bay City, Michigan, it was decided to retain an independent contract manufacturer to complete this final phase of the production process. The successful bidder agreed to buy all new, state of the art, one-up winders, which was projected to dramatically improve the quality of the rolls, in comparison to the final Saran Wrap product that was currently being produced by the Respondent on older equipment.

In a November 13 meeting with the Union, Respondent representatives announced the above changes and apprised the Union that the decision will result in the loss of about 30 jobs to the bargaining unit. Union President Gerald Martin asked Respondent Division Manager John Weymouth why the Employer would not use article X, section 3 for the change in the Saran Wrap process. Weymouth said, "that the outsourcing language didn't work for him and they felt it did not apply." Respondent's position was also articulated in the regularly scheduled November 20 bargaining committee meeting, when Labor Relations Manager James Story told the Union that the outsourcing provisions of the CBA were not applicable to the shutdown activities in the Saran Wrap plant because those activities are production decisions and the Employer has the right to determine what products are made and where they are made.

In or around late December 1996, the Union filed a grievance over the Respondent's refusal to utilize article X, section 3 regarding the shutdown activities in the Saran Wrap plant. The grievance was formalized at step 3 in January 1997, and a written step-3 decision was served on the Union. Although the record does not indicate, it appears the grievance was not referred to arbitration. Rather, the Union continued to process the underlying dispute through the Board's unfair labor practice procedures.

B. Negotiations Involving Article X, Section 3

The negotiations leading to the current CBA were finalized on February 13, 1995, and were chaired by human resources director for Respondent's Michigan Division, Elaine Reed Henry and Union President Dan Nadolski. These negotiations were the first time that the parties considered including language in their CBA to address the outsourcing of work. A working subgroup addressed this issue and while Union President Martin testified that he did not recall any specific examples of the type of business decisions that would not be applicable to the outsourcing provisions, collective-bargaining minutes introduced in evidence indicate otherwise. In this regard, Respondent expressed concerns through examples to define the scope of the outsourcing process. They were very concerned that the outsourcing provisions could complicate the issue of a business decision to sell a particular product that is no longer manufactured at the Midland facility or that the provisions might require it to bring through the outsourcing process a move from one plant in Michigan to another Dow site or any other outlying site. Union Chief Negotiator Nadolski confirmed during the subgroup discussions that this is not what the Union is talking about and it is not the intent of the language change.

C. The Use of Article X, Section 3

After the execution of the parties' CBA, the provisions of article X, section 3 were used on four separate occasions. In each instance, Respondent determined that site service functions presently performed by bargaining unit employees could be undertaken in a more efficient and cost effective manner by an outside supplier. For example, the interplant mail system at the Midland facility was work under the jurisdiction of the Union and Respondent took the position that it could be more economically handled if performed by an outside supplier. The provisions of article X, section 3 were used and a negotiated agreement resulted wherein the management of the mail group was contracted out but the day-to-day interplant mail distribution was retained by bargaining unit employees. In this example and the other three instances when the outsourcing provisions of the CBA were utilized, Union President William Laney testified that quality had nothing to do with the underlying decision but rather the issue of cost competitiveness drove the decision to consider the outsourcing of the work.

D. Analysis

On first impression this is a case that is ripe for deferral to the parties' CBA under the guidelines of the Board's decision in *Collyer Insulated Wire,* 192 NLRB 837 (1971). In *Collyer* the employer contended that the union's 8(a)(5) charge, alleging unilateral changes in conditions of employment, should be deferred to the grievance-arbitration procedure of the parties' labor contract. The Board ruled that it would defer to existing grievance-arbitration procedures in the following circumstances: (1) Where the dispute arose "within the confines of a long and productive collective-bargaining relationship," and there was no claim of "enmity by Respondent to employees' exercise of protected rights" (2) where "Respondent has . . . credibly asserted its willingness to resort to arbitration under a clause providing arbitration in a very broad range of disputes and unquestionably broad enough to embrace the dispute before the Board." and (3) where the contract and its meaning lie at the center of the dispute.

In the subject case, while the guidelines set forth in items 1 and 3 apply, the parties' CBA does not require binding arbitration on issues concerning the interpretation of any provisions of the agreement including unresolved matters under article X, section 3 (art. III, step 5 and app. F, p. 135 of G.C. Exh. 2). Under these circumstances, it is not appropriate to defer the underlying dispute to the grievance-arbitration machinery of the parties' CBA.

The General Counsel asserts that the Respondent's refusal to utilize the article X, section 3 outsourcing provision of the CBA with regard to its decision to eliminate the final wrap packaging process is a failure and refusal to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act.

Respondent opines that since the decision to eliminate the final wrap packaging process was made by DowBrands, an entity not subject to the parties' CBA, and the reason for the decision was to improve the quality of the product, that the elimination of the final wrap packaging process is not subject to the outsourcing provisions of article X, section 3.

DowBrands is the largest customer for the Saran manufacturing done at the Midland facility. It maintains its own manufacturing facilities in different areas then the Midland facility, has its own employees who enjoy independent benefit and compensation programs and has its own labor relations and human resource functions. Presently, there is no labor organization that represents DowBrands employees and DowBrands was not involved in the 1995 collective-bargaining negotiations that addressed the outsourcing provisions in the CBA. Thus, I find that DowBrands is not a party to the CBA. Likewise, I find that Respondent and DowBrands are not a single, integrated business enterprise because each company has its own president and board of directors, DowBrands maintains its own human resources function and it is separate from Respondent's labor relations operation, its people, facilities, benefits, books, records, markets, and business are distinct from Respondent and any services purchased from Respondent are obtained under contract and on a voluntary basis. See*, Western Union Corp.*, 224 NLRB 274 (1976). Accordingly, DowBrands has no bargaining obligation with the Union or an obligation to use article X, section 3.

DowBrands is basically in the consumer products business. It makes and sells products that go directly to the consumer whereas all of Respondent's business involves the processing of raw materials and the subsequent conversion into another product. Before November 1996, the Respondent completed the entire manufacturing and packaging process of the Saran Wrap product for DowBrands. In an independent decision, to which no member of Respondent's managerial staff participated, DowBrands decided to utilize an outside manufacturer to complete the winding and packaging function for the Saran Wrap process. The decision was based solely to improve the quality of the product due primarily to consumer dissatisfaction with the rolls produced by Respondent, and now involves the use of new roll-winding equipment that was specifically purchased by the outside contract manufacturer. Thus, DowBrands changed from purchasing the Saran Wrap as a finished product to buying bulk Saran film from Respondent to be shipped to the outside manufacturer to complete the winding and packaging process.

Reference to custom and past practice is a well recognized means of resolving ambiguity in collective-bargaining agreements. The parties past practice and their statements regarding the negotiation of article X, section 3, supports the Respondent's position that the provisions of article X, section 3 are not applicable to the decision to eliminate the final wrap packaging process. Indeed, I find that specific examples were referred to during those negotiations that would not be subject to the provisions of article X, section 3. The elimination of the winding and packaging process falls within the framework of those discussions. Moreover, Union Chief Negotiator Nadolski agreed that work changes that fell within those examples were not subject to article X, section 3. Here, unlike the parties' prior use of article X, section 3 for site service functions based on cost competitiveness, the subject change in removing the winding and packaging process was based on the ability to improve product quality, a reason reserved to Respondent under the management-rights clause in article X, section 2 of the parties' CBA and the parties' intent as revealed in their collective-bargaining negotiations under article X, section 3.

Under these circumstances, and contrary to the position of the General Counsel alleged in the complaint, I do not find that the Respondent's refusal to utilize the article X, section 3 outsourcing provision of the CBA with regard to its decision to eliminate the final wrap packaging process, violates Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent did not violate Section 8(a)(1) and (5) of the Act by its refusal to utilize the article X, section 3 outsourcing provision of the parties' collective-bargaining agreement with regard to its decision to eliminate the final wrap packaging process.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.